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No. 04-922

IN THE
Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION,
COMMITTEE TO SAVE BUCKNELL WRESTLING,
MARQUETTE WRESTLING CLUB,
YALE WRESTLING ASSOCIATION, AND
COLLEGE SPORTS COUNCIL,

PETITIONERS,

v.

DEPARTMENT OF EDUCATION,

RESPONDENT

On Petition for Writ of *Certiorari* to the U.S. Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners file this Supplemental Brief to advise the Court of new decisions and other matters, which have arisen since the filing of the petition for a writ of *certiorari* on January 6, 2005. In a separate filing, petitioners will reply to the Department's opposition filed on April 25, 2005.

I. *JACKSON* LITIGATION

On March 29, 2005, this Court held that Title IX's statutory ban on "discrimination" "on the basis of sex," 20 U.S.C. § 1681(a), includes differential treatment of a coach related to sex discrimination against his team. *Jackson v. Birmingham Bd. of Educ.*, 125 S.Ct. 1497, 1504 (2005). *Jackson* also held that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), held that 42 U.S.C. § 1982 includes a federal cause of action for retaliation against third-party advocacy, *id.* at 1505 n.1, that Coach Jackson's complaint alleges that he was retaliated against because of sex discrimination under Title IX, *id.* at 1510, and that Title IX does not authorize private actions to enforce regulatory requirements that exceed the scope of Title IX's statutory prohibition, *id.* at 1507 n.2.

The next four sections argue (1) that the recognition of coaches as direct beneficiaries under Title IX enables petitioners' coach members to allege redressable Title IX injuries, (2) that those injuries fall within the First Amendment, which establishes petitioners' standing to bring a facial challenge, (3) that petitioners adequately plead intentional discrimination under the notice-pleading standards recognized in *Jackson*, and (4) that *Jackson* clarifies that petitioners have no alternate remedy to enforce the Title IX regulations.

A. Discrimination Because of Third-Party's Sex. Until *Jackson*, it was not apparent that Title IX's statutory prohibition of gender discrimination includes a school's intentional, differential treatment of a teacher or coach based on the gender of a third-party student or athlete. 125 S.Ct. at 1508 ("teachers and coaches... are often in the best position to vindicate the rights of their students [and] to identify discrimination and bring it to the attention of administrators"). *Jackson* therefore opens the door to redressable Title IX injuries that coach members have suffered, continue to suffer,

and would assert against a future motion to dismiss.

Petitioners did not anticipate the breadth of the *Jackson* holding: the identified circuit split, 125 S.Ct. at 1503, concerned the enforceability of the retaliation regulation, not the statute.[1] Indeed, four justices dissented in *Jackson*, *id.* at 1510, and – to the extent that *Jackson* relies on *Sullivan* – three dissenting justices considered that decision "highly elliptical." 396 U.S. at 251 (1969) (Harlan, J., dissenting). Finally, because *Sullivan* came to this Court from the Virginia state courts, *Sullivan v. Little Hunting Park, Inc.*, 209 Va. 279, 163 S.E.2d 588 (Va. 1968) (plaintiffs brought actions as "chancery causes" in state court), it was not apparent that this Court later would read *Sullivan* to find a federal cause of action for third-party discrimination. *Jackson*, 125 S.Ct. at 1505 n.1. Instead, as an equity action in state court, *Sullivan* appeared to consider whether to allow an action under "a special function or authority of the courts to *dispense with fixed legal rules,... to supplement their defects* in particular cases,... in obedience to the dictates of natural right, or morality, or conscience." 1 J. Pomeroy, *A Treatise on Equity Jurisprudence* § 45 (5th ed. 1941) (emphasis added).[2]

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[1] *See Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 250 (5th Cir. 1997) (asking whether plaintiff was "a member of the special class for whose benefit 34 C.F.R. § 100.7(e) was enacted"); *Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 n.2 (4th Cir. 1994) (citing 34 C.F.R. § 100.7(e) as the basis for Title IX's prohibition of retaliation). Coming before *Alexander v. Sandoval*, 532 U.S. 275 (2001), these regulation-based decisions provided no notice that § 901(a) covers differential treatment of coaches because of sex discrimination against their teams.

[2] Indeed, if it openly had held that Mr. Sullivan had a federal cause of action, this Court may well have provided the recalcitrant Virginia courts a separate and new reason to dismiss Mr. Sullivan's suit on remand. *See, e.g., Ewing v. Dutrow*, 128 Va. 416, 104 S.E. 791, 792-93 (Va. 1920) ("wherever there exists at law a complete and adequate power, either for the prosecution of a right or the redressing of a wrong, courts of equity... have no jurisdiction or power to act") (citations and quotations omitted).

Petitioners raise these points not to quibble with the *Jackson* holding (which does not ultimately depend on *Sullivan*), but to justify their prior failure to have alleged coaches' direct injuries under Title IX and to authorize their making new arguments on appeal on the issue of standing. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001) (where coverage of a statute is at issue below, petitioner can raise new coverage arguments in seeking *certiorari*); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim'") (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *cf. Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-43 (1967) (new rule of law justifies allowing defendant to raise new defenses on appeal).

But even if they waived these injuries as a defense against the Department's motion to dismiss the *First Amended Complaint*, the Department no longer credibly can argue the futility of leave to file the *Second Amended Complaint*. App. 37a (denying leave for futility under *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Petitioners would file affidavits (1) that male and female member coaches of men's teams face artificial squad-size caps, solely to meet the Department's enrollment quota, (2) that male and female coaches of women's teams at the same schools do not have caps and instead can increase their squad sizes at will, (3) that under the requested relief (*i.e.*, an interest-based standard that prohibits intentional discrimination), schools would lose federal funding for continuing these practices, (4) that schools would change their policies to maintain federal funds; and (5) that petitioners or their members would file administrative complaints against schools that did not voluntarily change their behavior after petitioners prevail.

B. Standing for Facial Challenge. Along with the advocacy interest in *Jackson*, coaches have educational and associational interests protected by Title IX's broad sweep. 125 S.Ct. at 1505. Because the Three-Part Test interferes with these First-Amendment interests, petitioners' members have standing to bring a *facial challenge* against the Department's

overbroad rules, even if - as applied to them - those members would not have Article III standing to challenge a particular aspect of a rule. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations") (citing cases); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("(p)recision of regulation must be the touchstone in an area so closely touching our most precious [academic] freedoms") (citations omitted); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (requiring "colorable First Amendment challenge" to rebut "rule of rationality which will sustain legislation against other constitutional challenges").

In *Lyng v. Int'l Union*, this Court was "obliged" to consider a federal provision's First-Amendment associational restrictions in an equal-protection challenge. 485 U.S. 360, 365-66 (1988). Unlike the statute there, the rules here "directly and substantially interfere with [petitioners'] ability to associate" "in pursuit of a common goal by lawful means." *Id.* (internal quotations and citations omitted); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("State may not accomplish [a legitimate] purpose by invidious distinctions between classes of its citizens"), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *cf. Texas v. Lesage*, 528 U.S. 18, 21 (1999) (applying First Amendment caselaw to equal-protection issue); *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) ("denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit").

C. <u>Pleading Intentional Discrimination</u>. Coach Jackson's amended complaint alleges that he "complained... about gender discrimination in association with the girls' basketball" team that he coached, "noted serious infractions with regards to the expense accounts," and "noted the girls were prohibited from using various equipment including

but not limited to the sports facility." His complaint also alleges that "[t]he girls team was not provided a key for the padlock for the facility" and that Coach Jackson "was subjected to adverse terms of employment because of gender discrimination" and "subjected to... work conditions which were limited in enforcement to individuals in a protected class, female." *Jackson v. Birmingham Bd. of Educ.*, No. 02-1672 (U.S.), J.A., at 10-11.

Under notice pleading, a complaint must give fair notice of the plaintiff's claim. *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and alleging a disparate impact does not plead intentional discrimination, *Washington v. Davis*, 426 U.S. 229, 238-40 (1976). Coach Jackson did not allege that the school had a boys' basketball team; that any boys' teams had access to the sports facility, keys to the padlock, or expense accounts; or that (if they did) the differential treatment was "because of sex." Thus, nothing in the complaint supports an underlying Title IX violation except the allegation of "sex discrimination." Under notice pleading, however, that allegation suffices at the pleading stage. Pet. at 10-12. Petitioners have alleged both unlawful discrimination and that the challenged agency actions authorize that unlawful discrimination. App. 251-57a (¶¶ 48-53, 56, 60-70), 281a (¶¶ 103-105). Thus, petitioners have standing because the challenged action authorizes otherwise-illegal conduct. Pet. at 12-13; Pets.' Reply Br. at 4-6.

D. Alternate Remedy to Enforce Regulations. The Title IX regulations require schools to assess both genders' interest, which the challenged rules change to measuring participation and comparing it to enrollment. Pet. at 4-6. Although petitioners have procedural and equal-protection interests in schools' following the regulations, *Jackson* renders those regulations privately unenforceable. 125 S.Ct. at 1507 n.2. Because they have no alternate remedy to enforce the Title IX regulations against schools, petitioners can sue the Department to require it to follow its regulations. 5 U.S.C. § 704; *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Where the rights of individuals are affected, it is incumbent upon agen-

cies to follow their own procedures").

II. "ADDITIONAL CLARIFICATION"

On March 17, 2005, the Department issued a clarification of the Three-Part Test. James F. Manning, Delegated the Authority of the Assistant Secretary for Civil Rights, "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test - Part Three" (Mar. 17, 2005) ("Additional Clarification").[3] The Additional Clarification describes the Three-Part Test as creating "obligations." Cover letter, at 1. Although the Additional Clarification creates a presumption of Title IX compliance (even if a school surveys the interests only of the statistically under-represented gender), that presumption does not apply to school that cut a team for that gender. Additional Clarification, at 7. Thus, at non-proportional schools, the Three-Part Test continues to impose all financially motivated cuts solely on men's teams, regardless of any other factor. Pet. at 14.[4]

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[3] The new clarification is available at http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf (last visited May 6, 2005).

[4] Although it indicates that the Department does not enforce the Fourteenth Amendment, *Id.* at 1 n.1 ("because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution"), the Three-Part Test materially has altered the *constitutional rights* of teachers, students, and coaches in at least three circuits, which consider Title IX to displace an equal-protection challenge under 42 U.S.C. § 1983. *Compare Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996) (availability of a Title IX claim preempted claims under § 1983); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3rd Cir. 1990) (constitutional claims asserted under § 1983 are subsumed under Title IX); *Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 757 (2nd Cir.1998) ("We see nothing in *Sea Clammers* that would support a constitutional rights exception") *with Seamons v. Snow*, 84 F.3d 1226, 1233-34 & n.8 (10th Cir. 1996) (Title IX does not bar a § 1983 action so long as it is not based on a violation of Title IX itself); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir.1996) ("the *National Sea Clammers* doctrine pre-

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A. Department Needs Judicial Oversight. Petitioners have unearthed (and served on the Department) the procedural history of the 1979 Three-Part Test in the National Archives. These documents demonstrate that in 1979 the agency agreed with petitioners. *See* Pet. at 5 (procedural requirements triggered if agency classifies document as a rule); App. 219a ("failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX"). By continuing to call the Three-Part Test an obligation and re-clarifying it, even after learning its procedural heritage, the Department merely adjusts the hem on the emperor's new clothes. Even more than petitioners, the Department needs a court to declare the law.

B. Repeal Redresses Unequal-Footing Injury. The Additional Clarification's primary relevance lies in the reaction to it. *See, e.g.*, Michael Dobbs, *Title IX Web Surveys Criticized by NCAA*, WASHINGTON POST, Mar. 24, 2005, at D1 ("[National Collegiate Athletic Association] President Myles Brand [said that the] new guidelines... 'will likely stymie the growth of women's athletics'"); Tamar Lewin, *U.S. Rule on Women's Sports May Ease College Compliance*, N.Y. TIMES, Mar. 23, 2005, at A15 ("new guidance changes the whole landscape") (quoting Marcia Greenberger of the National Women's Law Center ("NWLC")).[5] If a minor clarification to the Three-Part Test's third prong would "likely stymie" the practice of adding women's teams in so-called emerging

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sents no impediment to the plaintiffs' pursuit of remedies for alleged violations of substantive due process"); *cf. Comm. for Full Employment v. Blumenthal*, 606 F.2d 1062, 1066 (D.C. Cir. 1979) (otherwise-illegal theory of standing applies where Fourteenth Amendment would continue to prohibit discrimination, even if recipient eschewed federal funds).

[5] As *amici curiae* below, NWLC argued that petitioners' prevailing would not effect school's actions and that Title IX did not cause schools' actions.

sports (*e.g.*, crew, equestrian[6]) or change the landscape, the *repeal* of all three prongs clearly would redress petitioners' unequal-footing injuries, even schools' adding back men's team. *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984) ("equal treatment... can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class"). Notwithstanding a merits dispute about which gender is the "favored class," the Three-Part Test's proponents and opponents all oppose invidious discrimination (Section I.B, *supra*) and unequal treatment. They differ, however, on how to measure equality (*e.g.*, interest vs. enrollment, App. 257a (¶ 69)) and when gender may serve as a controlling factor to remedy statistical imbalance in the absence of intentional discrimination. Whatever the ultimate resolution, the duly promulgated and presidentially approved regulations unambiguously put the equal-opportunity fulcrum at relative interest, not enrollment. Pet. at 4, Public statements on the Additional Clarification suggest that petitioners have standing to assert that claim.

III. NEW SECRETARY OF EDUCATION

On January 20, 2005, the Senate confirmed the Hon. Margaret Spellings as the Secretary of Education. 151 Cong.

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[6] At the interscholastic level, boy's track and wrestling are two orders of magnitude more popular than girl's crew or equestrian, and girls' crew and equestrian are not appreciably more popular than boys' crew and equestrian: track (491,822 boys, 415,666 girls); wrestling (244,984 boys, 3,032 girls); crew (2,186 boys, 2,359 girls); and equestrian (64 boys, 657 girls). *Amici Curiae* Br. of NWLC *et al.*, Ex. 12, at 181,185, 189, 191, No. 02-0072 (D.D.C.). While it does not impose a *per se* preference for track or wrestling over crew or equestrian, Title IX does prohibit gender-based discrimination. 20 U.S.C. § 1681(a). Thus, while a school may prefer men's, women's, or co-ed crew or equestrian over the more-popular track and wrestling, cutting men's track or wrestling and adding women's (but not men's) crew or equestrian provides strong circumstantial evidence of gender as an impermissibly controlling factor and, under an interest-based standard, of a Title IX violation.

Rec. S105 (daily ed. Jan. 20, 2005). By citing this judicially noticeable fact, petitioners cure the jurisdictional pleading defect in their Second Amended Complaint, which sought to invoke the legal fiction under *Ex parte Young*, 209 U.S. 123 (1908), of suing an *officer* as an alternative to suing the sovereign, but named only the federal *office*. *See* 28 U.S.C. § 1653; Pet. at 8-9 (citing cases); Sup. Ct. Rule 35.4; FED. R. CIV. P. 25(d)(2). Under *Ex parte Young*, courts often dismiss a suit against an agency while simultaneously ruling against that agency's officers. *See, e.g., Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 n.4 (1986); *cf. Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) (declining even to address agency's potential waiver of sovereign immunity because suit also named officers in official capacity and complaint sought prospective injunctive relief against ongoing violation of federal law).

CONCLUSION

As set forth above, the foregoing new authorities further demonstrate why petitioners have standing and a cause of action against the Department, *e.g. Patterson v. Alabama*, 294 U.S. 600, 607 (1935) ("in determining what justice [requires, appellate courts are] bound to consider any change, *either in fact or in law*, which has supervened since the judgment was entered") (emphasis added), thus further supporting this Court's granting the petition for a writ of *certiorari*.

May 9, 2005

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